

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE**

STEPHEN MICHAEL WEST, et al.,)	
)	
Plaintiffs-Appellees,)	
)	DAVIDSON COUNTY
v.)	No. 13-1627-I
)	
DERRICK D. SCHOFIELD, et al.,)	No. M2013-____-COA-R9-____
)	
Defendants-Appellants.)	

**ON APPLICATION FOR PERMISSION TO APPEAL FROM THE ORDER
OF THE DAVIDSON COUNTY CHANCERY COURT**

DEFENDANTS' APPLICATION FOR PERMISSION TO APPEAL

ROBERT E. COOPER, JR.
Attorney General & Reporter

JOSEPH F. WHALEN
Acting Solicitor General

ANDREW HAMILTON SMITH
Assistant Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
615-741-4349

KYLE HIXSON
Assistant Attorney General

NICHOLAS W. SPANGLER
Assistant Attorney General

INTRODUCTION

The defendants, pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, hereby file this application for permission to appeal. Interlocutory appellate review is necessary because the trial court has ordered the State to disclose the identities of its execution team, a decision from which the State has no other appellate remedy and that will unnecessarily burden the defendants' ability to enforce the State's laws. Further, there exists a readily available alternative to the disclosure of the identities of the execution team. Pursuant to Tenn. R. App. P. 9(d), the State has attached a copy of the order from which it seeks relief, the Order Compelling Discovery, filed on January 8, 2014. (Attachment A.) Also, the State has attached a copy of the trial court's statement of reasons supporting an immediate appeal, which were included in its February 11, 2014 order granting permission to seek a Rule 9 appeal. (Att. B.)

STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Did the trial court abuse its discretion by compelling the disclosure of the identities and locations of the John Doe defendants involved in the State's lethal injection process, where Tenn. Code Ann. § 10-7-504(h) treats such information as confidential?

STATEMENT OF THE CASE AND THE FACTS

On November 20, 2013, Stephen Michael West and four other condemned inmates filed a Complaint for Declaratory Judgment in the Davidson County Chancery Court.¹ In the first four counts of the plaintiffs' six-count complaint, the plaintiffs sought declarations that the Department of Correction's Execution Procedures for Lethal Injection, commonly referred to as the "lethal injection protocol," violates the Eighth and Fourteenth Amendments to the United States Constitutions and Article I, § 16, of the Tennessee Constitution because the Protocol (1) "creates a substantial risk of unnecessary pain when carried out exactly in the manner prescribed"; (2) "will require the use of compounded pentobarbital"; (3) "fails to provide adequate qualifications and training of personnel to minimize the known risks involved in execution by lethal injection"; and (4) "fails to require and include, and fails to comport with, those accepted medical practices necessary to minimize the known risks involved in execution by lethal injection." The plaintiffs alleged in their fifth count that the Protocol "violates federal and state drug laws

¹ The trial court later granted unopposed motion allowing six other condemned inmates to intervene in the action.

and the United States and Tennessee Constitutions.” In the sixth count, the plaintiffs alleged that “Tennessee’s secrecy statute, Tenn. Code Ann. § 10-7-504(h)(1), violates Plaintiffs’ federal and state constitutional rights and 42 U.S.C. § 1983.”

The Complaint named Derrick D. Schofield as a defendant in his official capacity as the Commissioner of the Department of Correction. The Complaint also listed four other Department of Correction officials as named defendants. Additionally, the Complaint included the following defendants:

JOHN DOE PHYSICIANS 1-100,
JOHN DOE PHARMACISTS 1-100,
JOHN DOE MEDICAL EXAMINERS 1-100,
JOHN DOE MEDICAL PERSONNEL 1-100,
JOHN DOE EXECUTIONERS 1-100.

On November 26, 2013, the plaintiffs served interrogatories on the defendants requesting the identities and locations of the previously unnamed “John Doe” defendants. (Att. C.) The defendants objected on December 4, 2013, asserting that the information the plaintiffs sought was irrelevant and privileged. (Att. D.) On December 5, 2013, the trial court entered an agreed protective order providing, *inter alia*, that the identities of the members of the “John Doe” defendants shall not be revealed unless essential to the litigation. (Att. E, § B.1.)

Eight days later, the plaintiffs filed a motion to compel the defendants to provide the identities of the John Doe defendants, without any explanation in the

motion as to why this information was essential to the litigation. (Att. F.) The defendants opposed this motion, contending that the information sought was irrelevant, privileged, and protected by both statute and the court's protective order because it was not essential to the litigation. (Att. G.) On January 3, 2014, the trial court conducted a hearing at the conclusion of which the Court found the information requested to be relevant and directed the defendants to reveal it within 20 days. (Transcript Attached as Att. H.) On January 8, 2014, the court entered an order compelling the defendants to provide the requested information by January 23, 2014. (Att. A.) On January 14, 2014, the trial court stayed this order pending the disposition of the defendants' motion for Rule 9 authorization, which the trial court granted. (Atts. I, J.) The trial court entered an order granting the defendants' Rule 9 motion on February 11, 2014. (Att. B.)

REASONS SUPPORTING AN IMMEDIATE APPEAL

The defendants are statutorily obligated to execute the death sentences imposed by the courts of this State. Tenn. Code Ann. §§ 40-23-114 to -116. This Court's immediate review is necessary because the defendants' ability to perform that duty and thus vindicate the State's interest in the enforcement of its laws will be irrevocably hindered should the defendants be required to disclose the identities of the members of the State's execution team, and other unnamed defendants. The trial found that "the revealing of th[is] information will be irreparable" and that the time to review its ruling is now. (Att. B at 5.) The defendants will have no other opportunity for meaningful review, and reversal of the trial court's ruling is likely.

Indeed, although it rejected the State's position, even the trial court conceded that "there is merit in [it]." (Att. B at 2.)

An interlocutory appeal requires the permission of both the trial court and the appellate court. *See* Tenn. R. App. P. 9(b) and (c). In determining whether to grant interlocutory review, the courts must consider:

(1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.

Tenn. R. App. P. 9(a); *see State v. McKim*, 215 S.W.3d 781, 789 (Tenn. 2007).

A. Compliance with the Trial Court's Order Will Cause Irreparable Harm.

Under the irreparable-injury factor, the critical component is typically whether the challenged order would have a "final and irreparable effect on the rights of the parties." *State v. Gawlas*, 614 S.W.2d 74, 75 (Tenn. Crim. App. 1980) (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)). Here, revelation of the identities of the John Doe defendants will present final and irreparable injury to the State. Once the identities are revealed, they cannot be unrevealed. The defendants will have no meaningful appellate remedy once these identities are disclosed; any review upon entry of a final judgment would be entirely

ineffective. Interlocutory appeal is thus the only remedy by which the defendants can obtain appellate review of the trial court's ruling.

The defendants have a vital interest in the confidentiality of the State's execution team, an interest which has both been codified by statute and recognized by this Court. *See* Tenn. Code Ann. 10-7-504(h); *Workman v. Campbell*, No. M2001-01445-COA-R3-CV, 2002 WL 869963, at *6 (Tenn. Ct. App. May 7, 2002) (copy attached as Att. K.) Given the State's considerable interest in the protection of this information and the irreparable harm that will occur should the defendants be forced to disclose it, this Court's immediate review is needed.

B. Reversal of the Trial Court's Order Is Likely.

The parties' agreed protective order places a high level of protection on the identities of the John Doe defendants, requiring a showing that such information would be "essential" to the proceedings at issue. (*See* Att. D, § B.1.) Here, despite repeated requests from the defendants, the plaintiffs have failed to articulate why it would not be possible to conduct this litigation using the form of redacted identification that the defendants have offered to provide, namely, a description of the parties' backgrounds, training, and education. This procedure would allow the plaintiffs adequate opportunity to explore the respective qualifications of the execution team, and it in fact would provide more information to the plaintiffs than would be provided by the revelation of a mere identity with no additional information. To the extent further information is required it could be obtained by

use of additional discovery tools tailored to protect the identities of the team members. Indeed, this is the very method utilized successfully in another case involving an earlier challenge to the State's lethal injection protocol. *See Harbison v. Little*, No. 3:06-cv-1206, D.E. Nos. 26, 92 (M.D. Tenn. 2007).

Tenn. Code Ann. § 10-7-504(h) codifies the State's interest in protecting the confidentiality of the John Doe defendants. Subsection (h)(1) expressly provides that "those parts of the record identifying an individual or entity as a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential" And subsection (h)(2) provides that such information "shall be redacted wherever possible" The agreed protective order in this case preserved this statutory confidentiality, but the plaintiffs have not met the standard that they agreed should govern this very request. Thus, because it is possible to litigate the constitutionality of the State's lethal injection procedures without revealing the identities of the individuals involved in carrying out the process, the information the plaintiffs seek must not be disclosed pursuant to the parties agreed protective order and Tenn. Code Ann. § 10-7-504(h)(2).

Moreover, even if the identities sought were not protected by the protective order and the statute, the plaintiffs' interest in receiving this information would still be substantially outweighed by the State's interest in protecting it. There is no sharp line of demarcation that separates the field in which discovery may be freely

pursued from that in which it is forbidden, and analyzing whether a discovery request is proper requires the balancing of numerous considerations. *Johnson v. Nissan North America Inc.*, 146 S.W.3d 600, 605 (Tenn. Ct. App. 2004).² These considerations include:

[R]elevancy or reasonable possibility of information leading to discovery of admissible evidence; privilege; protection of privacy, property and secret matters; and protection of parties or person from annoyance, embarrassment, oppression, or undue burden or expense.

Id.

Federal courts have used a balancing test similar to the one set forth in *Johnson* to determine whether confidential government information is discoverable.³ Where the government's interest in protecting confidential information outweighs the movant's interest in obtaining the information discovered, the information has been protected. *See United States v. Reynolds*, 345 U.S. 1, 11 (1953) (applying "executive privilege"); *Pack v. Beyer*, 157 F.R.D. 226, 232 (D. N.J. 1994) (applying "state secret" privilege). In the context of a discovery request, "the Court must balance the public interest in protecting the confidentiality of the information against the need for the discovery sought." *Pack*, 157 F.R.D. at 232 (citing *Reynolds*, 354 U.S. at 11). In *Pack*, the district court

² See Att. B at 3 (in granting permission to appeal, the trial court observed that "there are lots of values here . . . that have to be balanced").

³ The Tennessee Supreme Court frequently looks to comparable federal rules for guidance in interpreting the Tennessee Rules of Civil Procedure. *See, e.g., Williamson Cnty. v. Twin Lawn Dev. Co.*, 498 S.W.2d 317, 320 (Tenn. 1973).

denied the plaintiffs' motion to compel production of prison documents related to the prisoners' placement in a maximum-security setting, finding that the state's interest in the "confidential flow of information" within the prison outweighed the plaintiffs' interest in obtaining the documents. *Pack*, 157 F.R.D. at 223. Thus, the court determined that the defendants were not required to provide the requested discovery.

The Tennessee Supreme Court used this same balancing test in considering the government's assertion of secrecy in the context of confidential informants. See *State v. Ostein*, 293 S.W.3d 519, 529 (Tenn. 2009) ("the trial court's decision whether to order the disclosure of a confidential informant calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his [case]"). The Supreme Court noted that although this balancing test has been referred to as "the informer's privilege," this privilege "is in reality the Government's privilege" to withhold from disclosure the identity of persons vital to the enforcement of its laws. *Id.* at 527. "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement." *Id.* (citing *Roviaro v. United States*, 353 U.S. 53, 59 (1957)).⁴

⁴ This Court has noted the existence of the state-secret privilege. See *Schneider v. City of Jackson*, No. W2005-01234-COA-R3-CV, 2006 WL 1644369, at *13 n.8 (Tenn. Ct. App. Jan. 17, 2006) (copy attached as Att. L), *overruled on other grounds by Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007). While this Court has noted the inexactitude of the privilege's nomenclature, see *Schneider*, 2006 WL 1644369, at *13, the balancing test used to determine the discoverability of confidential information remains identical under any formulation, as do the purposes behind its existence.

Here, as in *Ostein*, the State defendants have a compelling interest in maintaining the secrecy of the identities sought, because the protection of this information is vital to the proper performance of their duties and thus to the enforcement of the State's laws. The defendants' concern is "for the security of the institution and for the safety of the staff members and their families. Members of the execution team and their families may be subject to retaliation and harassment if their identities became known throughout the institution or to the public at large." *Workman*, 2002 WL 869963, at *6 (quoting affidavit of then-warden). As this Court observed in *Workman*, "[t]he Warden's concern regarding the confidentiality of the execution team finds statutory support" in Tenn. Code. Ann. § 10-7-504(h)(1). *Id.*; see also *In re Lombardi*, --- F.3d ---, 2014 WL 288937, at *7 (8th Cir. Jan. 24, 2014) (copy attached as Att. M) (a clear abuse of discretion for district court to order discovery of identity of the compounding pharmacist, "the disclosure of which [the defendant] avers would prevent the State from acquiring lethal chemicals necessary to carry out the death penalty"). This concern is particularly strong with regard to the contractors or volunteers directly involved in executing a death sentence or producing or providing chemicals for use in carrying out a death sentence, including the pharmacy or pharmacist providing pentobarbital, a substance not readily available from other sources.

The trial court considered the terms of the protective order to be adequate, but the universe of individuals entitled to receive the information addressed within

the protective order, which includes the counsel and staff for five different legal offices, as well as any potential court reporters and experts consulted, is not insubstantial. That is why the order provides that the identities are to be revealed in the first instance only “to the extent essential to conduct the proceedings at issue.” (Att. E § B.1.) Given the large number of parties and counsel involved in this suit, the chance of an accidental leak of information is foreseeable and its source would be untraceable. While this risk might be acceptable if there were no alternative by which to proceed, the defendants’ offer to redact the identifying information of these individuals eliminates these risks without prejudicing the plaintiffs.

Specifically in the area of corrections, courts have consistently recognized the need to give deference to correctional administrators in maintaining the security of their institutions. *See, e.g. Turner v. Safely*, 482 U.S. 78, 84 (1987). Other courts have determined that keeping confidential the identities of execution-team members is rationally related to the security needs of a correctional institution. *See Thompson v. Department of Corrections*, 18 P.3d 1198, 1207 (Cal. 2001); *Bryan v. State*, 753 So.2d 1244, 1250 (Fla. 2000) (holding exemption of execution-team identities from public disclosure laws valid in order to protect security of the prison). Maintaining the confidentiality of the execution-team members is critical to the safety of that team and to the defendants’ ability to employ such team members in order to carry out their statutory duties.

C. This Application Should Be Granted to Create a Uniform Body of Law.

Factor three also weighs in favor of granting an interlocutory appeal. Because this issue is one of first impression in Tennessee, interlocutory appeal would provide the Tennessee Court of Appeals the opportunity to create a uniform body of law regarding the State's assertion of privilege and whether the identities of the State's execution team are protected.

CONCLUSION

For the reasons stated, the application for permission to appeal should be granted.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

JOSEPH F. WHALEN
Acting Solicitor General



Andrew Hamilton Smith, #26594
Kyle Hixson, #27306
Nicholas W. Spangler, #27552
Assistant Attorneys General
P. O. Box 20207
Nashville, Tennessee 37202
615-741-4349
andrew.smith@ag.tn.gov
615-532-4892, facsimile

CERTIFICATE OF SERVICE


I hereby certify that a true and exact copy of the foregoing application and its attachments have been forwarded by first class mail, on this the 21st day of February, 2014, to the following:

Mr. Stephen M. Kissinger
Ms. Susanne Bales
Federal Defender Services of Eastern, Tennessee, Inc.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929
(865) 637-7999

Mr. C. Eugene Shiles, Jr.
SPEARS, MOORE, REBMAN & WILLIAMS
P.O. Box 1749
Chattanooga, TN 37401
(423) 756-4801

Ms. Kelley Henry
Mr. Michael J. Passino
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37202
(615) 736-5265

Ms. Kelly Gleason, Assistant Post-Conviction Defender
Office of the Post-Conviction Defender
530 Church Street, Suite 600
P.O. Box 198068
Nashville, TN 37219
(615) 741-9430



ANDREW HAMILTON SMITH
Assistant Attorney General